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JUL 29 1991

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
EZ COMMUNICATIONS, INC.) File No. BRH-910401C2
For Renewal of License of FM)
Radio Station WBZZ(FM),)
Pittsburgh, Pennsylvania)
To: The Commission

OPPOSITION TO PETITION TO DENY

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July 29, 1991

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SUMMARY

In its Petition To Deny WBZZ(FM)'s license renewal application, Allegheny Communications Group, Inc. ("ACNI") attempts to enlarge an unpleasant dispute that WBZZ(FM) had with a former employee into a referendum on the basic qualifications of EZ Communications, Inc., its licensee. ACNI has succeeded in raising only baseless claims that demonstrate that it is motivated not by the public interest but by its desire to harass EZ and advance its competing construction permit application.

ACNI's Petition is based solely on matters involved in an arbitration and two civil actions brought by WBZZ(FM) its former

ACNT's contention that the WP77/EM1 license renewal must be

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EZ Communications, Inc. ("EZ") by its attorneys, herewith opposes a "Petition to Deny" ("Petition") the 1991 license renewal application of Radio Station WBZZ(FM), Pittsburgh, Pennsylvania, filed by Allegheny Communications Group, Inc. ("ACNI") on June 28, 1991.

ACNI's allegations are based solely on matters which were the subject of two public trials involving the station's former news director, Elizabeth Randolph.¹ Arguments and allegations made before and during the trials -- which were held in Pittsburgh, Pennsylvania -- have been twisted and distorted in order to attempt to make the Commission (and perhaps others) believe that there is some reason to find such fault with the operation of WBZZ that serious issues are raised about whether

¹ There was also a separate arbitration proceeding about whether Ms. Randolph was entitled to certain termination benefits. Even ACNI makes no claim that the arbitration proceeding has relevance to any substantive matter relating to WBZZ(FM)'s renewal.

its license should be renewed. Of course, ACNI has a strong interest in such non-renewal since it has, as it notes in its petition, filed an application which is mutually exclusive with WBZZ's license renewal application.² In its selective recitation of facts relating to the Randolph lawsuits, ACNI does note that there was a settlement in May of this year of both the Randolph defamation and invasion of privacy case (hereafter, tort case), which had come to trial and was on appeal, and the Randolph sex discrimination case, which had just started at the time of the settlement agreement.

In both cases, WBZZ's former news director, Ms. Randolph, was the plaintiff and WBZZ's licensee and/or station employees were named as defendants. The tort case resulted in a jury award of \$694,204 which was reduced to \$650,000 by the presiding judge following a post-trial motion by the defendants. That case was appealed by EZ, the other defendants, and the plaintiff. While the appeal was pending, a second proceeding involving many of the same facts began in Pittsburgh alleging that EZ had unlawful discriminated against Ms. Randolph. Both cases were settled

² Another competing application was filed against WBZZ's renewal by Pennsylvania Broadcasters, a four-person partnership composed of principals who are defendants in a suit brought by EZ in federal district court in Las Vegas, Nevada, because they have defaulted in payment obligations with respect to a more than \$3,000,000 debt owed for the purchase of a station from EZ in 1989. (FCC File No. BPH-910701ME.) As EZ expects to demonstrate at the appropriate time, the Pennsylvania Broadcasters' application in Pittsburgh as well as its simultaneously-filed application which is mutually exclusive with the renewal of EZ's WIOQ(FM) in Philadelphia, appear to be naked attempts to abuse the Commission's processes to procure a favorable outcome in the Nevada litigation for Pennsylvania Broadcasters' principals.

simultaneously by the parties, and, at the request of both parties, the previously public record was sealed. In addition, the parties were ordered by the court not to make further comments about the matters except to acknowledge that they were pleased that the cases had been settled.

It was and is EZ's intention to comply as strictly as possible with the terms of the settlement although EZ will, with Pennsylvania court permission, if necessary, respond fully to any Commission inquiry about the Randolph proceeding. However, the terms of the settlement -- which EZ certainly wishes to adhere to, if possible -- appear to make it appropriate to respond to ACNI's petition, at least at this juncture, with the most minimal possible recitation of facts developed at the trial and now under seal.³

³ We note that petitioner and its counsel appear to feel under no similar constraint. Thus, for example, although petitioner's counsel knew that the record in the case had been sealed, he apparently persuaded (see ACNI Petition, Attachment No. 8) an Allegheny County Court clerk to unseal a portion of the settlement transcript without making any attempt to obtain court permission to do so. Whether this reflects adversely on ACNI, or requires consideration of whether counsel is qualified to represent it under the circumstances, would be more appropriately subject to consideration if ACNI's competing application is eventually accepted for filing.

For a recent Commission decision relating to the same counsel's testimony in another Commission renewal proceeding, the Commission may wish to review Judge Sippel's decision in WWOR-TV, Inc., FCC 91D-34, released July 15, 1991, e.g. at pages 58-59. A principal issue in the WWOR-TV remand proceeding was whether a renewal challenge had been filed in good faith or for the purpose of obtaining a monetary settlement from the station. The WWOR-TV challenger's counsel, Mr. Cohen, who is also ACNI's counsel, testified extensively on the bona fide filing issue. Judge Sippel's July 15, 1991 decision states, among other things: (i)

(continued...)

for this and undervalued counsel have not been uniformly subject

proper to submit some of the questions to the jury at all. There has never been a final determination of the legal and factual issues in the tort case. While the sex discrimination case is arguably relevant to the FCC's interest in ensuring that licensees do not engage in employment discrimination, that case never resulted in any adjudication.⁶ At the time of the settlement, only three days of trial had taken place, the plaintiff's case had not been concluded, and EZ's had not begun.

It is thus obvious that ACNI's task is not an easy one. In the following sections of this opposition, we review ACNI's specific allegations.


I. None of the Contentions in the Petition Raise
 Questions About EZ's Qualifications To Remain a
 Commission Licensee

A. Alleged News Distortion

In what is perhaps its most convoluted argument, ACNI claims that because Ms. Randolph was held to be a public figure (for defamation test purposes) and because some fleeting comments over a more than two year period made by her colleagues performing on WBZZ's morning show were allegedly defamatory, those defamations must have constituted "news" and must be construed by the Commission to be actionable news distortions in violation of the Commission's policies.

⁶ See Policy Statement and Order, 5 FCC Rcd at 3254 n.6.

But ACNI neither alleges nor can it possibly establish that the allegedly offensive statements were made during newscasts or were indeed under any case theory intended to constitute news



B. Indecency

ACNI next claims, however tentatively,⁹ that WBZZ's morning team broadcast "indecent material" in violation of 18 U.S.C. § 1464.

First, it is of at least some relevance that, to the best of EZ's knowledge, no persons or group (prior to ACNI) has ever complained to the Commission about humorous or other remarks made during WBZZ's morning (or any other) program and, obviously, there has never been any Commission finding of any kind that any portion of that program was indecent. Although there were detailed newspaper accounts of the first Randolph trial which publicized the remarks complained of by Ms. Randolph, there is --

Even if the remarks were deemed inappropriately suggestive, there is no claim by ACNI -- or anybody else -- that they were anything other than fleeting and isolated comments which would be unworthy of Commission concern even if they were found to be indecent.

C. Sexual Discrimination

While this ACNI claim somewhat parallels allegations made in Ms. Randolph's own sex discrimination suit in Pittsburgh, it suffers from the same absence of supporting facts.

As we understand ACNI's position, which is not easy, Ms. Randolph was discriminated against because of allegedly sexist jokes about her, all of which were made on the air,¹¹ and would not have been made if she were a male instead of a female news director. The WBZZ morning team's words are said to have created a "hostile" work environment which caused Ms. Randolph, finally, to quit. ACNI claims that this discriminatory environment was particularly heinous because the remarks were broadcast over the air, thus making the public fully aware of them.

As indicated in the arbitration decision and district court opinion attached as Attachments 1 and 2 to ACNI's petition, Ms. Randolph, on what turned out to be her final day of broadcasting, left the station despite the fact that her shift had not been completed and did not return to WBZZ(FM) until later in the day. After careful consideration, EZ declined to continue her

¹¹ ACNI's makes no allegations with respect to non-broadcast speech or conduct by EZ or any of its employees.

employment. A central issue at the tort trial was whether the morning team's remarks over the air actually caused Ms. Randolph distress or whether there were other factors unrelated to WBZZ and her employment which had a far more important impact on her concerns and actions. Without referring to the matters addressed at trial pursuant to this issue, the fact is that Ms. Randolph was a paid member of WBZZ's morning team for more than two years and was free to leave her position or request reassignment by the station. ACNI presents no claim that she ever did so.

When a sexual discrimination claim is based solely on remarks intended to be comedic, addressed to a paid performer and broadcast over the air to the general public, this is hardly a routine discrimination claim. If a person who is paid to participate in an entertainment program can first be paid to do so and then sue her colleagues because she decides, after the program is over, that she objects to part of its content, speech may have legal consequences that have never existed before -- and should not, EZ believes, exist now.

Although EZ settled Ms. Randolph's discrimination suit, that does not mean that it had merit. It was, at the very least, a highly unusual claim for which there was little or no precedent, albeit in an area of the law which seems to be expanding. ACNI's request for an issue relating to this matter could require re-litigation of the entire original Randolph proceeding before the Commission, even though the parties have reached a mutually-agreeable settlement of it. Since Ms. Randolph has agreed to

that settlement and since the facts alleged by her relate solely to her own experiences at the station, no purpose would now be served by having the Commission hear evidence about this matter in connection with WBZZ's renewal application, particularly since WBZZ's employment record of female and minority employment has been outstanding.¹²

II. The Procedural Handling of the EZ-Randolph Settlement Does Not Raise Abuse of Process Issues

In its final implausible claim, ACNI alleges that EZ's court-supervised settlement with Ms. Randolph was designed principally to obstruct the public's and the Commission's examination of the tort and sex discrimination litigation. ACNI asks the Commission to draw this inference based merely on the timing of the litigant's settlement agreement. ACNI states that

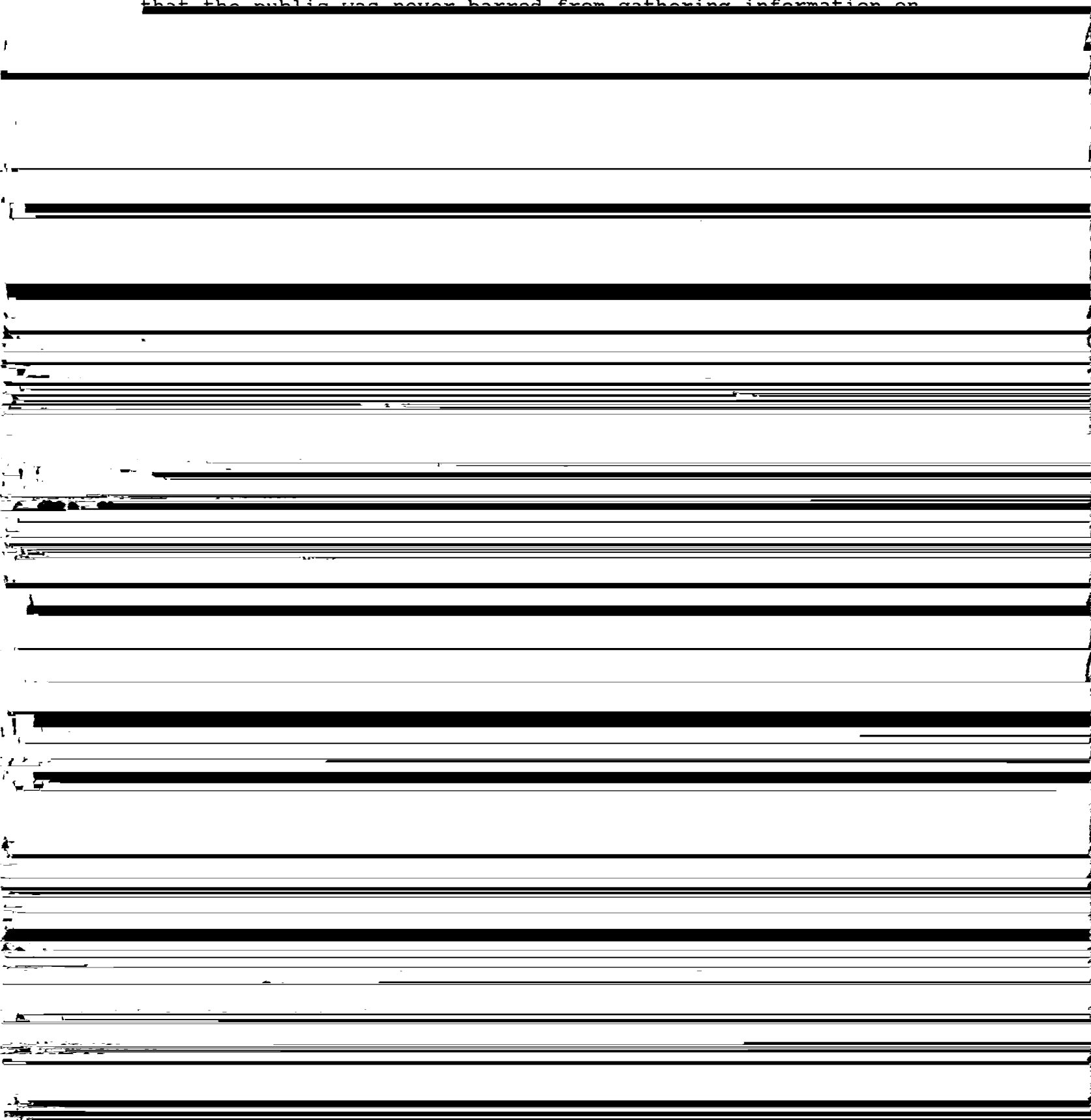
~~time 0.77 and it minimal had been observed in laboratory tests~~

ACNI's claim that the settlement was spurred by the imminent release of the Commission's reconsideration of its 1990 Policy Statement and Order on character qualifications, 5 FCC Rcd 3252 (1990), is wrong. That decision, which was released the day settlement discussions were being held before Judge Musmanno, did not broaden the scope of the Commission's character inquiry to include torts such as defamation. Nor did the public notice that preceded release of the decision or the petitions for reconsideration imply that evaluation of such torts was a possibility.¹⁵

ACNI devotes the remainder of its argument to contending that EZ's and Ms. Randolph's agreement to seal the judicial records "constitute[d] a clear abuse of the Commission's

15 In a somewhat related, but equally poor argument, ACNI contends that the jury's finding of defamation constitutes non-FCC misconduct that must be considered by the Commission in evaluating WBBZ's renewal application. This contention is based

processes" by hindering public or Commission review of those proceedings. (Petition, p. 18.) ACNI's simplistic claim ignores ~~that the public was never barred from gathering information on~~



1988, in an amendment it filed in connection with an application seeking FCC authority to acquire KLVV(FM), Pahrump, Nevada. (See FCC File No. BALH-880718HM.) Thereafter, the license renewal applications that EZ filed on July 29, 1988; September 27 and 28, 1988; January 30, 1989; September 29, 1989; June 1, 1990; July 31, 1990; September 28, 1990; and April 1, 1991 for thirteen of its stations, including WBZZ(FM), all reported on the status of the litigation.¹⁸

Moreover, ten months after EZ's first notification to the Commission, Ms. Randolph on May 3, 1989 filed a complaint with the FCC which related solely to her dispute with WBZZ(FM) and included over 100 pages of documentary material about her complaint. Although Ms. Randolph filed a letter with the FCC in late June 1991, withdrawing this complaint, she did not ask for return of any of her material, and her letter certainly does not preclude the Commission from further examination of the substance of her submission if it believes that there is merit to any of the claims.¹⁹

¹⁸ See, e.g., FCC File Nos. BRH-880729YA, BRH-880928UP, BR-880928UO, BRH-880927UH, BRH-890130WD, BRH-890929WH, BR-900601YW, BRH-900601YW, BR-900731B9, BRH-900731YT, BRH-900928ZT, BRH-910401C6, and BRH-910401C2.

¹⁹ The cases cited at page 19 of ACNI's Petition are clearly inapposite. The two cases in which issues were enlarged to determine if witnesses were intimidated or coerced involved harassment by private investigators (Chronicle Broadcasting Co., 19 FCC 2d 240, rev. denied, 23 FCC 2d 162 (1970)) and alleged payments to witnesses. (Harvit Broadcasting Corp., 24 RR 2d 352, 356-57 (Rev.Bd. 1972)). As for ACNI's claim that Ms. Randolph is precluded by the settlement from being a witness, EZ has never believed that Ms. Randolph could not seek and obtain court

(continued...)

Neither did the EZ-Randolph settlement preclude public interest groups or other entities from opposing the renewal of WBZZ(FM)'s license. The only parties that have mounted any challenge to the WBZZ(FM) renewal are ACNI and Pennsylvania Broadcasters, a partnership, which, as noted above at note 1, is comprised of four principals, all of whom are defendants in a contract action EZ has filed in federal district court in Las Vegas, Nevada.

The EZ-Randolph settlement agreement marked the end of extensive and acrimonious civil litigation between the parties. As is not unusual in such proceedings, the settlement agreement was confidential and resulted in the sealing of the court record at the mutual request and for the mutual benefit of both sides. (See Declaration of Terrence H. Murphy, attached as Exhibit A at ¶ 2 ("Murphy Declaration").) As is also customary in such court-supervised settlements, the agreement included mutual releases to ensure that the parties would not revive any settled claims in future proceedings in any forum. The agreement, including the broad releases and provisions relating to confidentiality, were approved by the presiding judge as a legal exercise of the parties' procedural and contractual rights. (See Murphy Declaration at ¶ 3.)

ACNI raises a question whether EZ has violated Section 73.3589 of the Commission's Rules, which requires that "[w]hen-

¹⁹(...continued)
 permission to respond to any appropriate FCC or judicial inquiry, and ACNI makes no claim to the contrary.

ever any payment is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection, the licensee must file with the Commission a copy of any written agreement" and a certification that the would-be petitioner was not paid any consideration in excess of expenses related to preparing the petition to deny.²⁰ Section 73.3589 was adopted to prohibit not the "'threat' to file itself, but the threat to file unless payment is received."²¹ Ms. Randolph had not threatened to file unless payment was received. No part of the settlement was paid "in exchange for" the portion of Ms. Randolph's release that dealt with the FCC.²²

The Commission has devoted considerable effort over the past several years to curbing abuses of its processes. In defining "abuse of process" and describing its intended references, the Commission made clear that its "use of this term...is, in general, confined to abuse of process arising from the filing of competing applications and petitions to deny."²³ The Commission

²⁰ 47 C.F.R. § 73.3589 (1990) (emphasis supplied).

²¹ Notice of Proposed Rule Making, 2 FCC Rcd 5563, 5565.

²² EZ believes that the settlement agreement does not support ACNI's claims, but that agreement is under seal and Ms. Randolph, through her counsel, has refused to permit a disclosure relating to the size of the settlement for this pleading. EZ does not believe that it is appropriate or necessary to ask for unsealing at this point.

²³ First Report and Order (BC Dkt. No. 81-742), 4 FCC Rcd 4780, 4793 n.3 (1989) (emphasis supplied). See also Report and Order (MM Dkt. No. 87-314), 67 2d 1526 (1990), recon., Memorandum Opinion and Order, FCC 91-170, released June 7, 1991; Report and Order (MM Dkt. No. 90-263), 6 FCC Rcd 85 (1990), recon., Memorandum Opinion and Order, FCC 91-155, released May 15, 1991.

has listed strike petitions, threats to file petitions to deny unless paid, and frivolous expressions of interest in allotment proceedings as examples of such abuses.²⁴

ACNI has not demonstrated that the EZ-Randolph settlement violates any of the Commission's rules or constitutes an abuse of FCC processes as the Commission has defined that term. Private parties, even FCC licensees, are free to enter court-supervised settlements of their civil litigation. Only if those settlements involve payment "in exchange for" a litigant's withdrawal of a petition to deny or promise to refrain from filing a petition do they even arguably fall within the ambit of the FCC's review. With its contentions, ACNI would require FCC evaluation of all judicial settlements involving Commission licensees that include a broad release. The Commission, which also restricts how its own proceedings may be settled to ensure that there is no abuse of process, has attempted to deter the filing of competing applications or baseless petitions to deny, such as ACNI's, that are simply motivated not by advancement of the public interest but by the filer's desire to receive a monetary pay-off.

In fact, ACNI's construction of Section 73.3589 could well deter aggrieved parties from bringing discrimination claims like Ms. Randolph's because their ability to settle such state or federal court actions could be barred if any settlement payment exceeding petition preparation costs (if any) was involved. This

²⁴ See generally Report and Order (MM Dkt. No. 87-314), 67 R.R. 2d 1526 (1990).

construction of Section 73.3589 obviously was not intended by the Commission.

III. Conclusion

DECLARATION

I, Terrence H. Murphy, declare under penalty of perjury that the following statements are true and correct:

1. I am a partner in the law firm of Klett Lieber Rooney & Schorling in Pittsburgh, Pennsylvania. My firm represented the defendants in the actions in the Pennsylvania Court of Common Pleas for Allegheny County, entitled Randolph v. Jefferson, et al., G.D. No. 88-02730, and Randolph v. EZ Communications, Inc., G.D. No. 89-22010.

2. The provisions of the agreements among the parties settling these cases are confidential. At the mutual request of both sides and for their mutual benefit, the records of the proceedings were sealed. Such confidentiality and sealing of the record is not unusual in civil court settlements.

3. The settlement agreements among the parties included broad mutual releases providing that none of the claims asserted would be revived in the future in proceedings in any forum. Such releases are customary in court-supervised settlements in Pennsylvania.

4. Both the confidentiality provisions and the broad releases were approved by the presiding judge.

By Terrence H. Murphy
Terrence H. Murphy

Dated: July 29, 1991

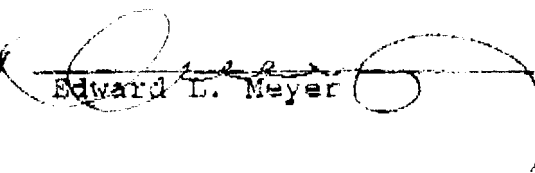
DECLARATION

I, Edward L. Meyer, declare under penalty of perjury that the following statements are true and correct:

1. I am employed by EZ Communications, Inc., the licensee of WBZZ(FM) in Pittsburgh, Pennsylvania. I have served as General Manager of the station since 1984.

2. I have read the Opposition to Petition To Deny that responds to the allegations made by Allegheny Communications Group, Inc. in the Petition To Deny that it filed on June 28, 1991, challenging the renewal of WBZZ(FM)'s license. With the exception of those statements of fact supported by the Declaration of Terry Murphy or by publicly available documents, records and statistics, I have personal knowledge and belief that all statements of fact in the Opposition are correct.

By


Edward L. Meyer

Date: 7/28/91

DECLARATION

I, Terrence H. Murphy, declare under penalty of perjury that the following statements are true and correct:

1. I am a partner in the law firm of Klett Lieber Rooney & Schorling in Pittsburgh, Pennsylvania. My firm represented the defendants in the actions in the Pennsylvania Court of Common Pleas for Allegheny County, entitled Randolph v. Jefferson, et al., G.D. No. 88-02730, and Randolph v. EZ Communications, Inc., G.D. No. 89-22010.